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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1446

THE PEOPLE OF THE STATE OF MICHIGAN

Petitioner,

vs.

WAYNE HAMPTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF MICHIGAN

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

NOW COMES William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Edward Reilly Wilson, Chief Appellate Attorney, and Timothy A. Baughman, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan, entered in the above-entitled cause on November 26, 1979, rehearing denied on February 1, 1980.

OPINIONS BELOW

The Order of the Michigan Court of Appeals denying leave to appeal is unreported, and is appended as Appendix "A". The Opinion of the Michigan Supreme Court is reported at 407 Mich 354; ___ NW 2d ___ (1979) and is appended as Appendix "B". The Order denying rehearing is appended as Appendix "C". The trial court order is appended as Appendix "D".

STATEMENT OF JURISDICTION

The Order of the Michigan Court of Appeals denying leave to appeal was entered May 11, 1977. The Opinion of the Michigan Supreme Court was issued November 26, 1979, and rehearing was denied on February 1, 1980. The jurisdiction of this Court is invoked under 28 USC Sec. 1257(3), and Cox Broadcasting v Cohn, 420 US 469 (1975); since the trial court order granting a new trial expressly found that the evidence was insufficient to convince a reasonable person of defendant's guilt beyond a reasonable doubt, see Appendix D, the outcome of further proceedings in the trial court is "preordained" (420 US at 479) by this court's decisions in Jackson v Virginia, ___ US ___, 61 LEd 2d 560 (1979) and Burks v United States, 437 US 1 (1978). To require petitioner to again proceed in the trial court and the Michigan appellate courts when the result is preordained by a decision of this court "would ... result in a completely unnecessary waste of time and energy in (a) judicial system already troubled by delay due to (a) congested docket." 420 US at 479

QUESTION PRESENTED

MUST STATE APPELLATE COURTS APPLY THE "REASONABLE DOUBT" TEST OF JACKSON V VIRGINIA TO SUFFICIENCY OF THE EVIDENCE CHALLENGES ON DIRECT REVIEW, AND IF SO, SHOULD JACKSON V VIRGINIA BE REEVALUATED BECAUSE IT NECESSARILY CAUSES THE REVIEWING COURT TO INVADE THE PROVINCE OF THE JURY?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Defendant was charged with first degree murder. At the conclusion of the People's case defendant made a motion for directed verdict, arguing there was no showing of deliberation or premeditation (R, 6), and arguing "mere presence". (R, 6-8). The trial judge denied the motion, finding that "there has been evidence presented from which the jury can find that the defendant Hampton deliberately, willfully, with

malice aforethought and with premeditation, participate(d) in the killing and murder of the deceased, Edgar Ervin Coleman." (R, 12-13).

At the close of all the proofs defendant renewed his motion. The trial judge indicated that based upon all the testimony, including testimony from defendant, perhaps a reasonable person could not find guilt beyond a reasonable doubt (R, 16-19). He reserved his ruling, however, until after the verdict (R-19).

The jury found defendant guilty of second degree murder and defendant asked for a ruling on his motion (R, 20-21). The trial judge granted the motion, ruling "I am not satisfied that the prosecution's evidence was sufficient to convince a reasonable person beyond a reasonable doubt that Mr. Hampton is guilty." (R, 23). However, rather than discharging defendant the trial judge ordered a new trial. (R, 23).

The Michigan Court of Appeals denied petitioner's application for leave to appeal on May 11, 1977, one judge dissenting on the ground that the legal standard employed by the trial judge was "An invasion of the province of the jury . . ." On November 26, 1979, the Michigan Supreme Court affirmed the trial court. Two justices found that Jackson v Virginia, ____ US ____; 61 LEd 2d 560 (1979) required modification of the Michigan directed verdict test from the "any evidence test" to the "reasonable doubt" test, but that discharge was inappropriate since a new trial had been ordered; two justices agreed that a new trial had been ordered, and though recognizing that Burks v United States, 437 US 1 (1978) likely mandated discharge on remand did not so order because defendant had not cross-appealed; and three justices wrote that a post-verdict directed verdict had been granted, that Jackson v Virginia, supra, required the "reasonable doubt" test, and that Burks v United States, supra, required discharge of the defendant. Rehearing was denied on February 1, 1980.

REASONS FOR GRANTING THE WRIT

Until the decision in Jackson v Virginia, ___ US ___; 61 LEd 2d 560 (1979), the standard to guide decision on a motion for directed verdict (judgment of acquittal) had consistently been stated by the Michigan Supreme Court since at least 1886, when in People v Eaton, 59 Mich 559; 26 NW 702 (1886) the court held that "The sufficiency of the evidence (is) exclusively for the jury. It is only where there is no evidence, upon a material point, that the court can take the case from the jury" (emphasis added). The same test was stated in People v Abernathy, 253 Mich 583; 235 NW 261 (1931), and expanded upon in People v Garcia, 33 Mich App 598; 190 NW 2d 347 (1971), affirmed 398 Mich 250; 247 NW 2d 537 (1976):

> . . . the test to be applied on a motion for directed verdict is not whether the evidence presented proves guilt beyond a reasonable doubt. It is, rather, whether or not there is any evidence at all either direct or circumstantial on each material element of the offense. . . if there is any evidence, be it direct or circumstantial, on each of the elements of the offense, the motion for directed verdict should be denied. And the trial should proceed to conclusion, at which time the fact finder then decides whether or not the evidence is sufficient to establish guilt beyond a reasonable doubt. (Emphasis added)

See also People v Vail, 393 Mich 460; 227 NW 2d 535 (1975); People v Johnson, 397 Mich 686; 246 NW 2d 836 (1976).

Given this Court's decision in Jackson v Virginia, supra, the Michigan Supreme Court felt obliged to overrule the above precedents. In Jackson v Virginia, this

Court held that in a habeas corpus challenge to a state criminal conviction the applicant is entitled to relief "if it is found that upon the evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." 61 LEd 2d at 576-577. Because the decision was founded on In re Winship, 397 US 358 (1970), it seems inescapable that if Jackson v Virginia is binding precedent it controls direct review in state courts on sufficiency of the evidence claims. Petitioner submits that the above-quoted "holding" is dicta, and that if it is not so viewed, petitioner submits that Jackson v Virginia should be reexamined, and overruled.

First, petitioner would point out that since this Court held in Jackson v Virginia that the evidence presented satisfied any standard, decision of whether the reasonable doubt standard is constitutionally required was not necessary to decision of the case (majority opinion, 61 LEd 2d at 577-578, dissent, 61 LEd 2d at 578-579). The "holding" on the reasonable doubt test is therefore obiter dicta, and Jackson v Virginia may be repudiated by this Court without doing violence to the doctrine of stare decisis. See Bardes v Hawarden Bank, 178 US 524 (1899); Humphrey v United States, 295 US 602 (1934); Darr v Burford, 339 US 200 (1949). The point is now squarely presented, as a state's highest court has repudiated its precedents because of this Court's decision of Jackson v Virginia. Jackson v Virginia should be looked at afresh, as petitioner submits that its "holding" on the reasonable doubt test is erroneous, and necessarily causes the reviewing court to invade the province of the jury.

For a number of years the federal system was divided between two directed verdict tests. One, known as the "Second Circuit rule" was first enunciated by Judge Learned Hand in United States v Feinberg, 140 F2d 592 (CA 2, 1977), and held that the standard for jury submission in criminal cases is identical to that in civil cases (establishment of a prima facie case). The other,

known as the "Curley rule", was expressed by Judge Prettyman in Curley v United States, 160 F2d 229, 232-233 (CA DC, 1947) thusly:

> The true rule, therefore, is that a trial judge in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.

In United States v Taylor, 464 F2d 240 (CA 2, 1972), the second circuit repudiated its former rule and adopted the "Curley rule", as have most circuits, and now, this Court. 2 Wright, Federal Practice and Procedure, Section 467, 255-257 (1969). The rationale behind the "Curley rule" is perhaps most concisely stated in Taylor: more "facts in evidence" are required for the judge to allow men and women of ordinary reason and fairness "to affirm the question the proponent is 'bound to maintain' when the proponent is required to establish this not merely by a preponderence of the evidence but, as all agree to be true in a criminal case, beyond a reasonable doubt." Taylor, at 242.

This Court stated the difficulty thusly:

> Any evidence that is relevant - that has any tendency to make the existance of an element of a crime slightly more probable than it would be

> without the evidence, CF Fed Rul Evid 401 - could be deemed a "mere modicum". But it could not seriously be argued that such a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt. The Thompson doctrine (any evidence) simply fails to supply a workable or even a predictable standard for determining whether the due process command of Winship has been honored. 61 LEd 2d at 574.

Petitioner contends that the "reasonable doubt" standard, despite disclaimers to the contrary, necessarily involves the reviewing judge in weighing the evidence, drawing inferences, and assessing credibility; in short, it requires the judge to invade the province of the jury. Further, the reasonable doubt test is less workable and predictable than the any evidence test.

In Moore's Federal Practice, Vol. 8A, Chapter 29, it is noted that it is "by no means clear" that there is some "substantive difference" between the Curley Rule and the former Second Circuit Rule, and that "it is doubtful whether the use of one as opposed to the other would materially affect the decision in a given case." Nonetheless, the Curley or reasonable doubt test makes possible a directed verdict of acquittal in cases where the prosecution has presented some evidence, either direct or circumstantial, on each material element of the offense charged. Indeed, the instant case is such a case, for the trial judge ruled that there was some evidence on all the elements when denying the motion for directed verdict made at the close of the prosecution case. Again, Petitioner submits that a reviewing court which grants a directed verdict where there is evidence presented on every element of the offense does so only by usurping the jury function.

It must be remembered that the reviewing judge or court is not to ask "do the facts presented prove guilt beyond a resonable doubt?" but rather "can the facts

presented prove guilt beyond a reasonable doubt?" If they can, the question of whether or not in the particular case they do is for the jury in the trial of that case. The judge is not to act as thirteenth juror. As noted, he cannot weigh evidence, draw inferences unfavorable to the People's case where fair inferences can be drawn, or assess credibility.

Fatal to the reasonable doubt rule as explained and defended in United States v Taylor, supra, and by this Court in Jackson v Virginia, supra, is the assumption that "more facts in evidence" are required to allow the case to go to the jury where the standard of persuasion is higher; that is, in a criminal case, where the standard is proof beyond a reasonable doubt, than in a civil case, where the standard is proof by a preponderance of the evidence. But can it be said that evidence which convinces a jury by a preponderance of the evidence might not also persuade the jury beyond a reasonable doubt if the jurors were so instructed? The following hypothetical, which goes to the heart of the matter, was posed by Judge Frank, an outspoken critic of the Second Circuit Rule, concurring in United States v Masiello, 235 F2d 279, 285 (CA 2, 1956):

> (a) There is testimony justifying some testimonial inferences. (b) A particular derivative inference (i.e., 'circumstantial evidence'), drawn from these testimonial inferences, is essential to a verdict for one party. (c) That derivative inference is rational, i.e., on the basis of that inference, the occurrence of an essential fact may be inferred rationally, although no one has testified to that fact. (d) The support in the testimonial inferences ('direct evidence') for that derivative inference (i.e. for that 'circumstantial evidence') is such that the occurrence of that inferred fact is more probable than its non-occurrence, but is not much more probable. In a civil jury case of

> that sort, the judge should not direct a verdict - and he may not properly, after verdict, enter a judgment n.o.v. - at variance with such a derivative inference (i.e., with the 'circumstantial evidence').
>
> Does the same rule apply in a criminal case? . . . The Second Circuit now says yes. Many other courts say, no. I think the latter answer correct (emphasis in the original).

The difficulty with Judge Frank's view, and this Court's view that a "mere modicum" of relevant evidence on each element cannot support a guilty verdict, is that whether "The support in the testimonial inferences . . . for that derivative inference . . . is such that the occurrence of that inferred fact is more probable than its non-occurrence but not much more probable," or whether in the particular case the inference follows beyond a reasonable doubt is a jury question. If the inference is rational the case should go to the jurors under proper instructions to determine whether they are persuaded beyond a reasonable doubt. For the trial judge or an appellate court to make the determination of the force which a rational inference carries in a particular case is to invade the province of the jury, for the jury is to draw all fair inferences and assign the weight to them it believes appropriate. That is their function.

The Michigan Supreme Court has repeatedly stressed the importance of the jury in the criminal justice system. The jury is the final judge of the credibility of witnesses. People v Dobine, 371 Mich 593; 124 NW 2d 795 (1963); People v Johnson, supra. The jury is the "sole judge of all the facts presented . . . . (and) may choose to believe or disbelieve any or all of the

evidence." People v Chamblis, 395 Mich 408, 420; 236 NW 2d 473 (1975). As expressed in People v Fuller, 395 Mich 451; 236 NW 2d 58 (1975), "This Court has steadfastly supported the right of the trier of fact, particularly the jury, to believe, or disbelieve, in whole or in part, any of the evidence presented." In sum, then, when considering a motion for directed verdict the trial judge must consider the evidence in the light most favorable to the People, considering the testimony of the People's witnesses to be true, and drawing all fair inferences in favor of the People's case. He may not weigh the evidence, or assess credibility, for the jury is the final judge of credibility, and may believe or disbelieve, in whole or in part, any evidence presented, and give that weight to evidence which it believes appropriate. Since, then, the trial judge must follow these guidelines, how can a directed verdict ever be granted or the evidence be found insufficient where there is some evidence, either direct or circumstantial, on each element of the offense without invading the province of the jury? Where there is some evidence in the People's case on each element, the jury is certainly free to credit it and believe it, and disbelieve all contrary evidence. Only by weighing the evidence, drawing unfavorable inferences, or assessing credibility may a trial judge or reviewing court grant a directed verdict (judgment of acquittal) where there is some evidence presented on every element and these things he is forbidden to do, both in Michigan and the federal system. The Michigan test was in harmony with the function of the jury. The over-ruling of that test, caused by Jackson v Virginia, supra, requires trial judges and appellate courts to usurp the jury function. Jackson v Virginia, supra, should be reconsidered.

CONCLUSION

WHEREFORE, for the reasons stated above petitioner submits that plenary review should be granted.

Respectfully submitted,

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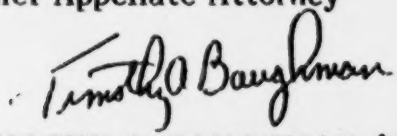
EDWARD REILLY WILSON
Chief Appellate Attorney



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Dated: February 20, 1980

TAB:pd

APPENDIX "A"

(State of Michigan - Court of Appeals)

At a session of the Court of Appeals of the State of Michigan, Held at the Court of Appeals in the City of Detroit, on the 10th day of May, in the year of our Lord one thousand nine hundred and seventy-seven.

Present: The Honorable Michael J. Kelly, Presiding Judge, S. Jerome Bronson, Michael F. Cavanagh, Judges.

Docket No. 77-1170
L.C. No. 76-05644

In this cause an application for leave to appeal is filed by plaintiff-appellant, and nothing in opposition having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application be, and the same is hereby DENIED. See, People v Johnson, 397 Mich 686 (1976).

Judge Kelly, dissenting, would grant as he finds the legal standard employed by the trial court an invasion of the province of the jury and irreconcilable with People v Garcia, 398 Mich 250 (1976).

State of Michigan - ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 11th day of May in the year of our Lord one thousand nine hundred and seventy seven.

/s/ Ronald L. Dzierbicki
Clerk

APPENDIX "B"

People v Hampton, Docket No. 59843. Argued December 6, 1978 (Calendar No. 15). - Decided November 26, 1979.

Frank J. Kelley, Attorney General, Robert A. Derengoski, Solicitor General, William L. Cahalan, Prosecuting Attorney, Edward Reilly Wilson, Principal Attorney, Appeals, and Timothy A. Baughman, Assistant Prosecuting Attorney, for the people.

LeRoy W. Daggs for defendant.

Coleman, C.J. Defendant and a codefendant, Lewis Griffin, were charged with two counts of first-degree murder (premeditated and felony murder), MCL 750.316; MSA 28.548, resulting from the fatal shooting of Edgar Coleman, Jr. At their trial, defendant made a motion for a directed verdict of acquittal at the conclusion of the people's case. The motion was denied after the judge said that the prosecution had presented evidence on each element of the offense. The motion was renewed at the close of all the proofs and the trial judge reserved his ruling on this motion until after the jury returned a verdict. After the jury found defendant guilty of second-degree murder on both counts, MCL 750.317; MSA 28.549, the judge ordered that the verdict be set aside and ordered a new trial. The prosecutor sought leave to appeal in the Court of Appeals but leave was denied. The prosecutor applied for leave to appeal in this Court which was granted and limited to the issue of: "Whether, under the circumstances of this case, the trial court invaded the province of the jury when he granted the defendant's motion for directed verdict after the jury had returned a verdict finding the defendant guilty."[1]

---

[1] See People v Hampton, 402 Mich 828 (1977)

I

On appeal, the prosecutor claims that the trial judge erred in directing a verdict of acquittal. He claims that the judge erred by employing an improper standard in ruling on the motion, by failing to view the evidence presented by the prosecution, and all reasonable inferences therefrom, in a light most favorable to the prosecution, by considering evidence presented by the defendant and by allowing an inaccurate view of the possible punishment to affect his decision.[2] The prosecutor argues that the standard to be applied in determining whether a motion for a directed verdict should be granted is whether there is any evidence on each material element of the offense and that questions of the sufficiency of the evidence are for the jury unless there is no evidence at all upon a material point, see People v Garcia, 398 Mich 250; 247 NW2d 547 (1976), People v Johnson, 397 Mich 686; 246 NW 2d 836 (1976), People v Abernathy, 253 Mich 583; 235 NW 261 (1931), People v Eaton, 59 Mich 559; 26 NW 702 (1886), People v Miller, 78 Mich App 336; 259 NW2d 877 (1977), People v Maliskey, 77 Mich App 444; 258 NW2d 512 (1977). Defendant contends that the proper standard for ruling on a motion for a directed verdict is whether the evidence is sufficient to justify a reasonable person in concluding that defendant is guilty beyond a reasonable doubt, see People v Edgar, 75 Mich App 467; 255 NW2d 648 (1977), People v Royal, 62 Mich App 756; 233 NW2d 860 (1975).

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[2] In ruling on defendant's motion the trial judge stated that he did not think the evidence came "through with as much clarity as I think the law requires if you are going to send a man away under a mandatory sentence of life imprisonment". However, the jury had returned a verdict of guilty of murder in the second degree which does not carry a mandatory life sentence, see MCL 750.317; MSA 28.549.

Recognizing that the reported opinions of the appellate courts of this state contain different and sometimes conflicting statements of the standards for directed verdicts, we granted leave to appeal in this case to resolve and settle the significant jurisprudential issue of what is the proper standard to be applied in passing on motions for directed verdicts in criminal cases. However, the resolution of this issue is now controlled by the rationale underlying the decision in Jackson v Virginia, ___ US ___; 99 S Ct 2781; 61 LEd 2d 560 (1979).

Jackson held that a Federal habeas corpus court, in determining whether a state conviction was based on sufficient evidence, must consider not whether there was any evidence to support the conviction but whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt.

In explaining the constitutional considerations underlying the decision in Jackson the Court stated:

> "In short, [In re] Winship [397 US 358; 90 S Ct 1068; 25 LEd 2d 368 (1970)] presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof - defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.
>
> * * *
>
> "[T]he federal courts of appeals have generally assumed that so long as the reasonable doubt instruction has been given at trial, the no-evidence doctrine of Thompson v Louisville [362 US 199; 80 S Ct 624; 4 LEd 2d 654 (1960)] remains the appropriate guide for a federal habeas corpus court to apply in assessing a state prisoner's

challenge to his conviction as founded upon insufficient evidence. We cannot agree.

"The Winship doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence. A 'reasonable doubt,' at a minimum, is one based upon 'reason.' Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as jury. In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction. Under Winship, which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that such a conviction occurs in a state trial, it cannot constitutionally stand." (Citations omitted). Jackson, supra, slip opinion, pp 8-10.

In rejecting the any evidence test, the Court focused on the differences between the concepts of relevancy and sufficiency of the evidence. Under MRE 402, all relevant evidence is admissible unless otherwise excluded. Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence, MRE 401. The test of relevancy is designed to determine whether a single piece of evidence is of such significant import that it warrants being considered in a case. The standards for admissibility are designed to permit the introduction of all relevant evidence, not otherwise excluded, on the theory that it is best to have as much useful information as possible in making these types of decisions, Turnbull v Richardson, 69 Mich 400, 416; 37 NW 499 (1888).

The concept of sufficiency, on the other hand, is designed to determine whether all the evidence, considered as a whole, justifies submitting the case to the trier of fact or requires a judgment as a matter of law. This is in contrast to the standards for relevancy which usually focus on one particular piece of evidence. The fact that some evidence is introduced does not necessarily mean that the evidence is sufficient to raise a jury issue. Because there is no requirement that the evidence be sufficient to support a conviction to be admissible, it does not necessarily follow that merely because some evidence is admitted, the evidence is sufficient to raise a jury issue. In quantitative terms, the fact that a piece of evidence has some tendency to make the existence of a fact more probable, or less probable, does not necessarily mean that the evidence would justify a reasonable juror in reasonably concluding the existence of that fact beyond a reasonable doubt.

Due process requires that the prosecutor introduce sufficient evidence which could justify a trier of fact in reasonably concluding that defendant is guilty beyond a reasonable doubt before a defendant can be convicted of a criminal offense, see, Jackson, supra. If sufficient evidence is not introduced, a directed verdict or judgment of acquittal should be entered. The statements in Johnson, supra; Abernathy, supra; Eaton, supra, to the effect that a trial judge should direct a verdict only where there is no evidence on a material element of the offense are specifically disapproved.

In summary, the trial judge when ruling on a motion for a directed verdict of acquittal must consider the evidence presented by the prosecution up to the time the motion is made, Garcia, supra, view that evidence in a light most favorable to the prosecution, People v Vail, 393 Mich 460, 463; 227 NW2d 535 (1975), and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt, Jackson, supra, slip opinion, p 11.

II

However, the standards governing directed verdicts do not require that the jury's verdict of guilty be reinstated. From the facts as they have evolved, we find that the trial judge did not direct a verdict of acquittal. He set aside the jury's verdict and ordered a new trial. Although this ruling was made following arguments on defendant's motion for a directed verdict, the judge actually ordered a new trial and did not direct a verdict.[3] The trial judge's order provided:

> "Defendant having moved for a directed verdict at the close of the prosecution's proofs, and that motion having been denied, the court ruling that the prosecution had presented some evidence on all the elements of the offense; and that motion having been renewed at the close of all proofs, and decision reserved by the court until after return of the verdict, and the jury having

---

[3] At oral arguments, the prosecutor claimed that Burks v United States, 437 US 1; 98 S Ct 2141; 57 L Ed 2d 1 (1978), held that it was a violation of double jeopardy to order a new trial after setting aside a jury's verdict of guilty as being against the great weight of the evidence. Traditionally, the granting of a new trial on this basis with the defendant's consent was not viewed as violating double jeopardy, see People v Fochtman, 226 Mich 53; 197 NW 166 (1924), 21 Am Jur 2d, Criminal Law, §209, p 253. The holding in Burks, supra, does not directly apply to or resolve this issue because it concerned the ordering of a new trial after a directed verdict of acquittal. In fact, the question of whether the ordering of a new trial on the basis that the verdict was against the great weight of the evidence violates double jeopardy was specifically left unresolved in Greene v Massey, 437 US 19, 26, fn 10; 98 S Ct 2151; 57 L Ed 2d 15 (1978), decided the same day as Burks, supra.

returned verdicts of guilty of second-degree murder against defendant; this court hereby finds that the evidence presented was not sufficient to convince a reasonable person beyond a reasonable doubt of defendant's guilt, consequently:

"It Is Ordered that the jury verdicts as to Defendant Hampton [handwritten by Judge Crockett] be set aside, ~~defendant's renewed motion for a directed verdict is GRANTED~~, and a new trial is ordered." (Cancellations made by hand in original.)

The statements in the two paragraphs of the order are ambiguous and even confusing in light of the judge's oral explanatory statements. We do not interpret the order as representing a conclusion by the trial judge that a verdict of acquittal was required as a matter of law, even under the Jackson standards. The testimony, arguments of counsel and statements by the trial judge preceding the rulings on these issues clearly indicate that when ruling on these motions, the trial judge did not consider the prosecution's evidence in its best light, considered evidence offered by the defense and may have permitted an inaccurate view of the possible punishment to affect his decision.[4]

---

[4] During the arguments on the motion made at the close of all the proofs, the following discussion occurred:

THE COURT: The only basis on which you can get a conviction against the defendant Hampton is on the theory that he aided and abetted in the commission of this homicide. And as I recall the proofs, I'm inclined to think that you are dependent almost entirely on that evidence as to whether he was the one who pressed the

release in the Buick that opened the trunk. I think everything else that you claim he did lends itself to the conclusion that it was not done voluntarily, that it was done under maybe two or three different species of compulsion. One, for his own protection dealing with a person considerably his senior, a former Marine, who had regaled him time and time again about his exploits, and who during all of this period of time is with Mr. Hampton's knowledge armed with a sawed-off shotgun. And secondly, for the safety of his sister, who seemed to be dumb enough to cultivate that kind of friendship and posed the danger for her younger brother. And third, his own immaturity.

Now I am wondering if that sort of summary of the evidence with respect to him isn't enough to warrant the conclusion that no reasonable person could conclude beyond a reasonable doubt that he is guilty.

[PROSECUTOR]: I would think that's not the case, your Honor. There are a chain of events here which would lead or should be able to lead a jury to reasonably find that he is guilty. The only element of compulsion that was ever testifed to was that the defendant Mr. Griffin somehow touched his gun at the time when he first picked up the car and told the defendant Mr. Hampton to get in.

THE COURT: Well, you don't mean the only element of compulsion. You might mean the only overt threatening act.

[PROSECUTOR]: Yes.

THE COURT: All right. That's different from an element of compulsion.

[PROSECUTOR]: The only overt threatening act was that. After that time there was ample opportunity for Mr. Hampton to disassociate himself with the chain of events that led to Mr. Coleman's death. He in fact was present during the time when Mr. Coleman was being bound and gagged. There is some evidence, at least the way I look at the evidence, to indicate that Mr. Griffin could not have bound and gagged and retained possession of the shotgun in the home.

There is an opportunity of Mr. - that Mr. Hampton had to reveal his predicament at the time when he got out of the car, went to the gas station, obtained some gas. There was another opportunity for him to disassociate himself with the chain of events when he returned the gas can. He didn't make any of those efforts.

THE COURT: Now during all of this time he is operating under circumstances where his sister is in the presence of his codefendant, who has a sawed-off shotgun.

[PROSECUTOR]: But there is no evidence whatsoever, your Honor, that Mr. Griffin's presence with the sister was threatening at all to the sister. There was no threats made to the sister. She apparently went along with this thing voluntarily. She didn't testify that Mr. Griffin made her do anything at all.

THE COURT: Wasn't there some testimony to the effect that Mr. Hampton initially was reluctant or refused to get in the car when they were leaving the house and his sister, according to his testimony, indicated to him that he had better comply? Don't you remember that testimony?

[PROSECUTOR]: Once again, your Honor, that's Mr. Hampton's testimony. It's not - it's not - it's not his sister's testimony at all. There was ample opportunity for defense to bring that out. It never came out. There is no evidence whatsoever that his sister felt - felt threatened or that anyone felt threatened at any time except for that one instance when, if you believe Mr. Hampton, Mr. Griffin made a threatening gesture when he first obtained the car. That is the only evidence that any threats or any type of duress was used at all towards Mr. Hampton.

After the verdict was returned, defendant requested a ruling on his motion and the following discussion took place:

[PROSECUTOR]: Secondly, I think that we have a jury to decide these matters. I don't believe that we can review their findings. I think that there was sufficient evidence that -

THE COURT: What do you mean - you said you don't think we can review their findings?
[PROSECUTOR]: I think that - I think -
THE COURT: Don't you always do that on a motion to set aside the jury's verdict and grant a new trial?

* * *

THE COURT: The whole theory of the prosecution, as I indicated before, in prosecuting Hampton was that he voluntarily aided and abetted in this killing and also in the robbery. I indicated earlier when the motion was made at the close of all of the proofs for a directed verdict, that in my judgment the only act, assuming that the evidence established that act, on which the prosecution could rely to show aiding and abetting, was the contention that Mr. Hampton was the one who pressed the release that caused the back trunk to open to permit Mr. Griffin to take out the body.
Mr. Hampton denied that he did that. The prosecution's star witness, Mr. Griffin's sister, who was sitting right on the front seat, denied that he did it, and testified that Mr. Griffin himself was - I didn't mean to say Mr. Griffin's sister; Mr. Hampton's sister. And she testified that Mr. Griffin himself was the one that came back into the front of the car, pressed the release to open the trunk.
The prosecution relies on the testimony of Mr. Griffin's sister. But her testimony, as I recall it, is pretty clear to the effect that she not only was overly excited, she was frightened, she was down on the floor of the car behind the seat. And her only basis for concluding that Mr. Hampton was the one who pressed the release was that she believes he leaned over the back seat.
A prior inconsistent statement in which Ms. Griffin stated that Mr. Hampton pressed the release button that opened the trunk was introduced to impeach her testimony that she did not see Mr. Hampton press the button.
Now whether he leaned over the back seat to press the release or whether he leaned over the back seat for any other reason or whether in fact he leaned over the back seat, does not come through with as much clarity

Because the trial judge weighed the evidence presented by both the prosecutor and defendant, we conclude that his findings and order are more consistent with the ordering of a new trial than with the direction of a verdict of acquittal.

The standards governing the grant or denial of a motion for a new trial are different from those for a directed verdict. MCL 770.1; MSA 28.1098, provides:

> "The court in which the trial of any indictment shall be had may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it shall appear to the court that justice has not been done, and on such terms and conditions as the court shall direct."

Under this statute, a new trial may be granted if the trial judge finds that the guilty verdict was not in accordance with the evidence introduced and that an injustice has been done. People v Henssler, 48 Mich 49, 51; 11 NW 804 (1882), People v Rayford Johnson, 391 Mich 834; 218 NW2d 378 (1974). See, also GCR 1963, 527.1(5). The decision whether to grant or deny a motion for a new trial is entrusted to the discretion of the trial court and that decision will not be disturbed on appeal without a showing of an abuse of discretion, People v Andrews, 360 Mich 572; 104 NW2d 199 (1960), People v Lowenstein, 309 Mich 94; 14 NW2d 794 (1944).

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as I think the law requires if you are going to send a man away under a mandatory sentence of life imprisonment.
I am not satisfied that justice was done in this case. I am not satisfied that the jury followed the court's instructions. I am not satisifed that the prosecution's evidence was sufficient to convince a reasonable person beyond a reasonable doubt that Mr. Hampton is guilty. The jury's verdict is set aside. A new trial is ordered in the case of Mr. Hampton.

Even the defendant, who argued that this Court should adopt a directed verdict standard similar to the one required by Jackson, concludes that the trial judge's findings and order were consistent with the standards governing the ordering of new trials. In his brief, it is argued that:

> "Here, the record shows that the trial judge in passing upon defendant-appellee's motion gave full pay [sic, play?] to the right of the jury to determine credibility, draw inferences of fact, and determine whether a reasonable mind might fairly conclude guilt beyond a reasonable doubt. The trial judge determined upon the evidence that a reasonable mind might have a reasonable doubt as to the guilt of the defendant-appellee and so set the verdict aside and ordered a new trial. In doing so he was not required to apply the standards required had he acquitted the defendant-appellee.
>
> * * *
>
> "Wherefore, appellee respectfully requests that the order of the trial judge vacating the defendant's conviction be upheld and a new trial ordered."

For these reasons and because defendant has not appealed or requested a review of this order, we would decline to reverse the order for a new trial and to order that a directed verdict of acquittal be entered.

A review of the record in this case does not show that the trial judge abused his discretion in granting a new trial or that his actions impermissibly invaded the province of the jury.[5]

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[5] "There is no incongruity or inconsistency in requiring the Court to submit the issues to the jury if there is substantial evidence to support a verdict of guilty, and

Affirmed.

Fitzgerald, J., concurred with Coleman, C.J.

Levin, J. (concurring). The trial judge's statements explaining his decision to grant the defendant post-verdict relief do not, as a matter of Michigan procedural law, change the nature of the order which he entered - as a matter of Michigan law he ordered a new trial and did not direct a verdict.[1]

I agree with my colleagues that a trial judge is authorized, although there is, prima facie, sufficient evidence to present a question for the jury, to grant a new trial "for any cause for which by law a new trial may be granted, or when it shall appear to the court that justice has not been done", MCL 770.1; MSA 28.1098. Unless such authority is abused,[2] an order granting a new trial because the judge regards the verdict as contrary to the great weight of the evidence[3] or not in accord with a just result does not invade the province of the jury.

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at the same time in empowering it to set the verdict aside if it is deemed contrary to the weight of evidence. In directing a judgment of acquittal, the Court makes a final disposition of the case. On the other hand, in setting the verdict aside the Court merely grants a new trial and submits the issues for determination by another jury. It is appropriate that in the latter instance, the Court should have wide discretion in the interest of justice." (Footnote omitted.) United States v Robinson, 71 F Supp 9, 11 (D DC, 1947).

[1] Courts speak through their judgments and orders, not their oral statements or written opinions. Tiedman v Tiedman, 400 Mich 571, 576; 255 NW 2d 632 (1977).

[2] See People v Nick, 360 Mich 219, 224; 103 NW2d 435 (1960).

[3] See GCR 1963, 527.1(5).

I agree with the Chief Justice that the judge did not in this case abuse his discretion in granting a new trial. In so concluding, I have considered the judge's statement before entry of the order which, although not material in deciding what he did, are pertinent in deciding whether what he did was justified.

I cannot sign the Chief Justice's opinion, however, because there is no need to consider the standard for directing a verdict in a case where, as a matter of Michigan procedural law, no verdict was directed. For the same reason I cannot sign Justice Ryan's opinion.

Although, as appears from Justice Ryan's opinion, Hampton may have a substantial double jeopardy claim,[4] it is not before us. This appeal was brought by the prosecutor. The only issue on which leave was granted was "whether * * * the trial court invaded the province of the jury when he granted the defendant's motion for directed verdict after the jury had returned a verdict finding the defendant guilty".

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[4] In Burks v United States, 437 US 1; 98 S Ct 2141; 57 L Ed 2d 1 (1978), the United States Supreme Court held that the Double Jeopardy Clause precludes a second trial following a reviewing court's reversal of a defendant's conviction in a prior trial solely for lack of sufficient evidence to sustain the jury's verdict. A companion case, Greene v Massey, 437 US 19, 24; 98 S Ct 2151; 57 L Ed 2d 15 (1978), declared that the Burks standard applied to state proceedings as part of the constitutional prohibition against double jeopardy. See Benton v Maryland, 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969).

It now appears that the judge did not direct a verdict, but simply ordered a new trial, and that the case should be disposed of on that basis. Our misapprehension of the issue when we granted leave to appeal does not expand the scope of the grant to an issue not necessarily implicated by the limited grant of leave to appeal.[5] No double jeopardy issue was raised by the prosecutor. Nor was such an issue raised by Hampton, who did not seek leave to cross appeal and has made no argument in that regard. It is therefore inappropriate, without briefing or argument, to reach a double jeopardy issue. Similarly, since Hampton did not seek leave to cross appeal the implicit denial of his motion for directed verdict and has made no argument that the judge erred in failing to direct a verdict, we cannot properly decide whether Hampton is entitled to affirmative relief on the ground that the failure to direct a verdict was error.

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[5] The prosecutor's brief adverted to several double jeopardy decisions of the United States Supreme Court, but only to argue that United States v Martin Linen Supply Co, 430 US 564, 570; 97 S Ct 1349; 51 L Ed 2d 642 (1977), was distinguishable and the trial judge's ruling was appealable because a successful appeal would result in reinstatement of the guilty verdict rather than a further trial or proceeding "devoted to the resolution of factual issues going to the elements of the offense charged". Therefore, the prosecutor's brief did not anticipate that we might find a retrial constitutionally forbidden. The disposition which we believe to be correct makes it unnecessary to consider whether, if the judge had directed a verdict, it would be appealable consistent with the Double Jeopardy Clause.

Although the judge did not, as a matter of Michigan procedural law, direct a verdict, he may have done so, as Justice Ryan writes, as a matter of Federal double jeopardy law. This is still another reason why I cannot sign the Chief Justice's opinion as some of her observations may be read as bearing on whether the judge directed a verdict as a matter of Federal double jeopardy law.

I would affirm the Court of Appeals remanding for a new trial without prejudice to Hampton raising a double jeopardy issue.

Williams, J., concurred with Levin, J.

Ryan, J. (concurring in part; dissenting in part). We are asked the specific question:

> "Whether, under the circumstances of this case, the trial court invaded the province of the jury when he granted the defendant's motion for directed verdict after the jury had returned a verdict finding the defendant guilty."[1]

The Chief Justice recognizes that in order to answer this question we must first determine the correct standard to be utilized by a trial court in ruling upon a motion for a directed verdict in criminal cases. We agree with the standard she adopts but do not agree that a new trial may be ordered in the instant case.

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[1] 402 Mich 828, 829 (1977). This appeal was brought by the prosecutor on the belief that the trial judge had granted the defendant's reserved motion for directed verdict, but had done so pursuant to an incorrect standard. See, infra, fns 2, 3.

We recognize that our case law has failed in the past to clearly articulate the standard trial judges are to apply in ruling on motions for directed verdict in criminal cases.[2] Moreover, we are persuaded, as is the Chief Justice, that the rationale of Jackson v Virginia, ____ US ____; 99 S Ct 2781; 61 L Ed 2d 560 (1979), supports our adoption of the following standard to be utilized by trial courts in ruling upon these motions: Whether the evidence presented by the prosecution,

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[2] See, for example, People v Minney, 155 Mich 534; 119 NW 918 (1909), and People v Abernathy, 253 Mich 583; 235 NW 261 (1931).

In passing upon a motion for directed verdict in Minney, the trial court denied the motion, saying:

"The case may be very weak, indeed the evidence may be entirely insufficient upon which to base a conviction, and yet it does not follow that the court should direct a verdict for the defendant."

The Supreme Court specifically disapproved of this statement, saying:

"[T]he statement of the court that it should not direct a verdict when the evidence is entirely insufficient upon which to base a conviction is not correct. If upon the conceded and undisputed facts there is no ground to sustain a verdict of guilty, the court should direct a verdict. The question then becomes one of law for the court." 155 Mich 536-537.

The Abernathy Court, in language of which we specifically disapprove today, said:

"The question of the sufficiency of the evidence is one for the jury unless there is no evidence at all upon a material point." 253 Mich 587.

That Court may have adopted this rule as the negative correlative to the rule that if there is no evidence on an element of the offense the trial court must direct a verdict. However, it does not necessarily nor logically follow from this latter rule that if there is some evidence on every element of the offense the trial court may not direct a verdict.

viewed in the light most favorable to it, is sufficient evidence from which a rational trier of fact could find guilt beyond a reasonable doubt of each of the essential elements of the crime.

However, after adopting this standard, the Chief Justice determines it does not require reversal on the facts of this case. Her conclusion is based on a finding that the trial judge in this case did not direct a verdict, but instead exercised his discretion to order a new trial on the ground that the verdict was against the great weight of the evidence.

We disagree. As the Chief Justice's opinion accurately reports, the defendant made separate motions for directed verdict of acquittal at the conclusion of the prosecution's case and again at the conclusion of all of the proofs. The trial judge denied the first motion, and reserved his ruling on the second. No motion was made or argued for a new trial, and it is undoubted that none is necessary to confer on the trial judge, in an appropriate case, the power to order a new trial. GCR 1963, 527.4. Nonetheless, the trial judge in this case could not properly reach the issue of whether a new trial should be ordered, pursuant to GCR 1963, 527.1(5), unless and until he first resolved the defendant's pending motion for directed verdict, which sought to test the legal sufficiency of the prosecution's proofs to establish a jury-submissible case. Therefore, it was necessary that, before the trial judge could properly sua sponte order a new trial on the ground contended, he must first have resolved the defendant's pending motion for directed verdict against the defendant. Stated otherwise, even assuming arguendo that the trial judge's order for a new trial was based on his determination that the jury's verdict was against the great weight of the evidence, he was required to have first determined that the prosecution had presented evidence legally sufficient to establish a jury-submissible case. That determination equally required denial of defendant's then pending motion for directed verdict of acquittal.

Thus, while the trial judge's written order purports, in its modified form, to deal only with the matter of a new trial, it has the inescapable effect of working a denial of the defendant's otherwise unresolved motion for directed verdict. The basic issue thereby emerges: Whether the trial judge erred in his resolution of the defendant's motion(s) for directed verdict of acquittal?

As the Chief Justice correctly states: "Due process requires that the prosecutor introduce sufficient evidence which could justify a trier of fact in reasonably concluding that defendant is guilty beyond a reasonable doubt before a defendant can be convicted of a criminal offense, see Jackson, supra. If sufficient evidence is not introduced, a directed verdict or judgment of acquittal should be entered". Coleman, C. J., p 368.

In a case where the prosecution does not introduce sufficient evidence which could justify a trier of fact in reasonably concluding that defendant is guilty beyond a reasonable doubt, the error committed is in the trial court's failure to grant a defendant's motion for a directed verdict of acquittal and enter judgment thereon, an error which cannot be remedied by ordering a new trial.

Certainly a trial court has the discretion to grant a new trial after a guilty verdict has been returned when the court finds that verdict is against the great weight of the evidence. GCR 1963, 527.1(5). See People v Henssler, 48 Mich 49, 51; 11 NW 884 (1882), where the Court said, in pertinent part:

> "The weight to be given the testimony, where conflicting, should be left to the jury. If at a

> subsequent time the trial court is of opinion that the verdict was not in accordance with the evidence introduced and that injustice has been done thereby, full power is possessed by the court to correct the error or mistake of the jury by granting a new trial."

Similarly, in People v Johnson, 397 Mich 686, 687; 246 NW 2d 836 (1976), where the trial court set aside a guilty verdict and ordered a new trial because it disbelieved the prosecution witnesses, we upheld its power to do so while holding that the same court could not dismiss the charges against the defendant because there was sufficient evidence produced to support a conviction. The trial court had found, in effect, that the verdict was against the great weight of the evidence; consequently, it had the discretion to order a new trial and to allow a second jury the opportunity to evaluate the credibility of the prosecution witnesses. However, since the prosecution's evidence, viewed most favorably to the prosecution, was sufficient to sustain a verdict of guilty beyond a reasonable doubt, the trial court had no power to dismiss the charges before the second trial.[3]

We do not think the trial judge made, or could properly have made, a finding that the verdict was against the great weight of the evidence in the case before us. Instead, we find that the trial judge, after applying a standard consistent with the one we announce today, directed a verdict of acquittal.

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[3] We agree with the Chief Justice that the statement in Johnson, as well as similar statements in People v Eaton, 59 Mich 559; 26 NW 702 (1886), and Abernathy, supra, to the effect that a trial judge should direct a verdict only when there is no evidence on a material element of the offense, are specifically disapproved.

Careful examination of the transcript of the colloquies between the court and both trial counsel which occurred at the close of all the evidence and again immediately following the jury verdict, suggest that while the trial judge may have been unsure what label to assign the relief being requested of him, he clearly understood that the issue presented concerned the sufficiency of the evidence to support a guilty verdict.

After all the evidence was in and before closing arguments to the jury, the following occurred:

"THE COURT: Anything further, gentlemen:

[DEFENSE COUNSEL]: Your Honor, I should just like to renew my motion again to the court on a dismissal as to Mr. Hampton, just briefly.

Your Honor, at this time I would renew my motion as to both counts as to Mr. Hampton. And I think that now the court has before it all the testimony of the witnesses, and I believe that the testimony of the witnesses at this particular juncture, your Honor, reveals no evidence whatsoever that a homicide was committed pursuant to any plan, advice, or suggestion of the defendant Mr. Wayne Hampton; but in fact reveals that the homicide was a spontaneous act on the part of the defendant Lewis Griffin, who had told everyone else at the scene that the deceased would not be harmed.

And further, your Honor, I should like to state that the testimony also indicates that the murder itself was too separated in time and action from the robbery to be considered for a felony-murder charge as to Wayne Hampton.

And the testimony further shows, your Honor, that Wayne Hampton was merely present at the scene of the murder, and his position is no different from that of the other witnesses in the automobile.

So as to both counts here, your Honor, I don't think the people have sustained a prima facie case as to Mr. Wayne Hampton. I think all the testimony is diametrically opposed, uncontradicted, as to Mr. Hampton, and I would renew my motion again for the court. That is a legal question here, and that the court should on its own motion dismiss Mr. Hampton from this particular case without it going to the jury.

THE COURT: Do you wish to be heard, Mr. [Prosecutor]?

[PROSECUTOR]: Well, your Honor, I would merely repeat the argument that I have made on a previous occasion at the end of my proofs. I would rest on that argument. I don't think there has been any indication, any evidence, which could negate the elements of my argument. Perhaps there is an additional element for the jury to consider, but that's a jury question.

THE COURT: The only basis on which you can get a conviction against the defendant Hampton is on the theory that he aided and abetted in the commission of this homicide. And as I recall the proofs, I'm inclined to think that you are dependent almost entirely on that evidence as to whether he was the one who pressed the release in the Buick that opened the trunk. I think everything else that you claim he did lends itself to the conclusion that it was not done voluntarily, that it was done under maybe two or three different species of compulsion. One, for his own protection dealing with a person considerably his senior, a former Marine, who had regaled him time and time again about his exploits, and who during all of this period of time is with Mr. Hampton's knowledge armed with a sawed-off shotgun. And secondly, for the safety of his sister, who seemed to be dumb enough to cultivate that kind of friendship and posed the danger for her younger brother. And third, his own immaturity.

"Now I am wondering if that sort of summary of the evidence with respect to him isn't enough to warrant the conclusion that no reasonable person could conclude beyond a reasonable doubt that he is guilty." (Emphasis added)

There ensued a long colloquy between the court and the assistant prosecuting attorney, including a recitation by defense counsel of his reason for asking that the court "dismiss Mr. Hampton" which he concluded by stating:

"And I feel there has not been substantial evidence or testimony in this case to find this man guilty of anything, and I don't think it is a case to go to the jury. I really don't, and I think the court on its own motion should dismiss Mr. Hampton. I don't believe this is a case at all to go to the jury."

The trial judge then asked:

"THE COURT: Do I have to decide this motion now, or can I let it go to the jury and reserve my decision?

[DEFENSE COUNSEL]: Well, if you want -

THE COURT: Mr. Prosecutor?

[PROSECUTOR]: I think you can reserve your decision.

THE COURT: I think that's what I'll do. Anything further?

[DEFENSE COUNSEL]: No, your Honor."

After the jury returned a verdict of guilty of second-degree murder against Mr. Hampton, defense counsel asked for a ruling on his earlier motion which the trial judge had "reserved". After a brief reply by the assistant prosecuting attorney the court ruled as follows:

"THE COURT: The whole theory of the prosecution, as I indicated before, in prosecuting Hampton was that he voluntarily aided and abetted in this killing and also in the robbery. I indicated earlier when the motion was made at the close of all of the proofs for a directed verdict, that in my judgment the only act, assuming that the evidence established that act, on which the prosecution could rely to show aiding and abetting, was the contention that Mr. Hampton was the one who pressed the release that caused the back trunk to open to permit Mr. Griffin to take out the body.

Mr. Hampton denied that he did that. The prosecution's star witness, Mr. Griffin's sister, who was sitting right on the front seat, denied that he did it, and testified that Mr. Griffin himself was - I didn't mean to say Mr. Griffin's sister; Mr. Hampton's sister. And she testified that Mr. Griffin himself was the one that came back into the front of the car, pressed the release to open the trunk.

"The prosecution relies on the testimony of Mr. Griffin's sister. But her testimony, as I recall it, is pretty clear to the effect that she not only was overly excited, she was frightened, she was down on the floor of the car behind the seat. And her only basis for concluding that Mr. Hampton was the one who pressed the release was that she believes he leaned over the back seat.

Now whether he leaned over the back seat to press the release or whether he leaned over the back seat for any other reason or whether in fact he leaned over the back seat, does not come through with as much clarity as I think the law requires if you are going to send a man away under a mandatory sentence of life imprisonment.

I am not satisfied that justice was done in this case. I am not satisfied that the jury followed the Court's instructions. I am not satisfied that the prosecution's evidence was sufficient to convince a reasonable person beyond a reasonable doubt that Mr. Hampton is guilty.

The jury's verdict is set aside. A new trial is ordered in the case of Mr. Hampton." (Emphasis added)

Having once wondered on the record "if that sort of summary of the evidence with respect to [Hampton] isn't enough to warrant the conclusion that no reasonable person could conclude beyond a reasonable doubt that he is guilty" and having later declared that he was "not satisfied that the prosecution's evidence was sufficient to convince a reasonable person beyond a reasonable doubt that Mr. Hampton is guilty", the court can only be understood to have set aside the verdict on the basis that, as a matter of law, there was insufficient evidence to sustain the jury verdict of guilty beyond a reasonable doubt.

If there was any question about that, it was laid to rest when the court's written order was entered which recited:

"[T]his court hereby finds that the evidence presented was not sufficient to convince a reasonable person beyond a reasonable doubt of defendant's guilt * * *."

The question then is whether it was error for the court, having set aside the verdict for insufficient evidence, to order a new trial. We hold that it was.

The United States Supreme Court has held that the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution precludes a second trial when conviction in the first trial was reversed by the reviewing court solely for lack of sufficient evidence to sustain the jury's verdict, even though the defendant specifically requested a new trial. Burks v United States, 437 US 1, 18; 98 S Ct 2141; 57 L Ed 2d 1 (1978).

In Greene v Massey, 437 US 19, 25, 98 S Ct 2151; 57 L Ed 2d 15 (1978), decided the same day as Burks, the Court said the same result would obtain upon comparable facts following a state court conviction.

There is no justification for reaching a contrary result because a trial judge, rather than a reviewing court, has determined as a matter of law that the prosecution's proofs are insufficient to support a finding of guilt beyond a reasonable doubt. Having found that the evidence, viewed most favorably toward the prosecution, was legally insufficient to support a finding of guilt beyond a reasonable doubt, the trial court was compelled to enter a judgment of acquittal and was thus precluded from granting defendant a new trial.[4]

Upon our own painstaking examination of the record in this case, conducted in conformance with the constitutionally binding standard announced in Jackson v Virginia, supra, we conclude that the trial court did

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[4] Where the prosecution fails to introduce sufficient evidence on each essential element of the crime which could justify a trier of fact in reasonably concluding that the defendant is guilty beyond a reasonable doubt, due process requires the entry of a judgment of acquittal, and the trial judge clearly has no discretion to do otherwise.

Where the prosecution does introduce sufficient evidence on each essential element of the crime which could justify a trier of fact in reasonably concluding that the defendant is guilty beyond a reasonable doubt, but such technically sufficient evidence is greatly overwhelmed by contrary evidence, the trial judge has discretion to set aside a jury verdict of guilty and order retrial of the case before another fact-finder.

In the former instance, the judge is required to make a purely legal determination; while in the latter the judge is empowered, not to substitute his factual judgment for the jury's, but to substitute another fact-finder for the original one.

not err in finding that the evidence produced by the prosecutor was legally insufficient to support a finding of guilt beyond a reasonable doubt.[5]

The trial court's order setting aside the jury verdict against defendant should be affirmed, the order granting a new trial should be vacated, and a judgment of acquittal should be entered.

Kavanagh and Blair Moody, Jr., JJ., concurred with Ryan, J.

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[5]We note that double jeopardy considerations do not preclude our review of the trial court's post-verdict legal determination that the prosecution's evidence was insufficient to support a finding of guilt beyond a reasonable doubt. A reversal of that ruling would not require the defendant to "run the gauntlet" of a new trial but would merely result in the reinstatement of the jury's guilty verdict. See United States v Wilson, 420 US 332, 352-353; 95 S Ct 1013; 43 L Ed 2d 232 (1975).

APPENDIX "C"

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 1st day of February in the year of our Lord one thousand nine hundred and eighty.

Present: The Honorable Mary S. Coleman, Chief Justice. Thomas Giles Kavanagh, G. Mennen Williams, Charles L. Levin, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

Rehearing No. 9

People of the State of Michigan,
Plaintiff-Appellant

v 59843

Wayne Hampton,
Defendant-Appellee

COA # 77-1170
LC: #76-05644

In this cause a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

State of Michigan - ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 1st day of February in the year of our Lord one thousand nine hundred and eighty.

/s/ Corbin R. Davis
Deputy Clerk.

APPENDIX "D"

(Recorder's Court - City of Detroit)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff
v No. 76-05644
WAYNE HAMPTON,
Defendant.

ORDER

At a session of said Court held: April 4, 1977
PRESENT: Hon. _____

Defendant having moved for a directed verdict at the close of the prosecution's proofs, and that motion having been denied, the court ruling that the prosecution had presented some evidence on all the elements of the offense; and that motion having been renewed at the close of all proofs, and decision reserved by the court until after return of the verdict, and the jury having returned verdicts of guilty of second-degree murder against defendant; this court hereby finds that the evidence presented was not sufficient to convince a reasonable person beyond a reasonable doubt of defendant's guilt, consequently:

IT IS ORDERED that the jury verdicts as to Defendant Hampton (handwritten by Judge Crockett) be set aside, ~~defendant's renewed motion for a directed verdict is GRANTED~~, and a new trial is ordered.

HON. /s/ George W. Crockett,
Recorder's Court Judge

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1446

PEOPLE OF THE STATE OF MICHIGAN
Petitioner,

-v-

WAYNE HAMPTON
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Wayne Hampton respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Michigan Supreme Court's opinion in this case. That opinion is reported at 407 Mich 354; 285 NW 2d 284 (1979).

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REASON FOR DENYING THE WRIT

Petitioner asks this Court to determine whether the "reasonable doubt" test of Jackson v Virginia, ____ US ____; 99 SCt 2781; 61 LEd 2d 560 (1979) applies to sufficiency challenges on direct review, upon the record and opinion in the instant case. Yet the instant case should not be reviewed because (a) the holding of Jackson supra, as a matter of constitutional law, would necessarily have to apply to state appellate courts on direct review, (b) the facts and circumstances of the instant case do not demonstrate that the Jackson, supra, or "reasonable doubt," test is unworkable, and (c) in any event, even if this court were to reevaluate the "reasonable doubt" test and revert to the previous "No Evidence" standard of Thompson v Louisville, 362 US 199; 80 SCt 624; 4 LEd 2d 654; 80 ALR 2d 1355 (1960), the result in the instant case would not change, for respondant was granted a New Trial, and not Judgment of Acquittal.

That the holding of Jackson, supra, would also apply to cases on direct review in state appellate courts, can hardly be questioned. Indeed Mr. Justice Stewart stated as much, when he wrote:

> " . . . A challenge to a state conviction brought on the ground that the evidence cannot fairly be deemed sufficient to have established guilt beyond a reasonable doubt states a federal constitutional claim. Although state appellate review undoubtedly will serve in the vast majority of cases to vindicate the due process protections that follows from Winship, the same could also be said of the vast majority of other federal constitutional rights that may be implicated in a state criminal trial. It is the occasional abuse that the federal writ habeas corpus stands ready to correct. [citations omitted]" 61LEd 2d at 575-576
> (emphasis added)

Respondent sees no need to expressly consider this question under the circumstances. Similarly, Petitioner has failed to demonstrate how the application of Jackson, supra, to the instant case, demonstrates that the test is unworkable. Indeed, a majority of the Michigan Supreme court took the position that the trial court in fact granted a motion for new trial, rather than a directed verdict of acquittal. See People v Hampton, 407 Mich 354; 285 NW 2d 284 (1979), Opinions of Justices Coleman and Levin. It must not be overlooked that the trial court order of Judge Crockett, Jr. was issued on April 4,

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1977, over two years before Jackson, supra, was decided. Indeed, it is not even clear that the Jackson standard was even applied to the instant case by the trial court. See Hampton, supra, 407 Mich at 372, Opinion of Justice Coleman.

The hypothetical proposed by petitioner in demonstrating the awkwardness of the "reasonable doubt" standard simply fails to apply to the facts of the instant case. Respondent maintains that "... the burden that is likely to follow from acceptance of the Winship standard has ... been exaggerated" Jackson, supra, 61 LEd 2d at 575. But if this court should desire to reevaluate the standard imposed by Jackson supra, respondent suggests that this case is not the appropriate one to consider.

This court should consider the question only when a case appears in which a different result would follow under the "No evidence" test than under the "Reasonable doubt" test. Cf In re Winship, 397 US 358; 90 SCt 1068; 25 LEd 2d 368; 51 Ohio Ops 2d 323 (1970), where the trial Judge noted that the result might well have been different under a different standard of proof.

The Michigan Supreme Court did originally grant leave to appeal in the instant case on the question of whether, in the circumstances of this case, the trial court invaded the province of the jury when he granted the defendant's motion for directed verdict after the jury had returned a verdict finding the defendant guilty. See 408 Mich 828; ____ NW 2d __. But since the court ruled that Hampton was in fact granted a new trial rather than a directed verdict of acquittal, this case is not an appropriate one in which to review the questions presented in Petitioner's Writ.

Nor is the outcome of further proceedings in the trial court necessarily "preordained" by this Court's decisions in Jackson v Virginia, supra, and Burks v United States, 437 US1; 98 SCt 2141; 57 LEd 2d 1 (1978). As pointed out by Justice Coleman "... the question of whether the ordering of a new trial ... violates double jeopardy was specifically left unresolved in Greene v Massey, 437 US 19, 26, fn 10; 98 SCt 2151; 57 LEd 2d 15 (1978). decided the same day as Burks, supra." Hampton, supra, 407 Mich at 369,n3.

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Rather than granting certiorari, this court should allow the prosecutor to proceed with a new trial in the trial court. The trial court should be allowed the first opportunity to consider whether any double jeopardy prohibitions effect the instant case.

CONCLUSION

WHEREFORE, for the reasons stated above, respondent submits that plenary review should not be granted.

Respectfully submitted,

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IN THE

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October Term, 1979

No. 79 1446

PEOPLE OF THE STATE OF MICHIGAN, Petitioner

v.

WAYNE HAMPTON, Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, WAYNE HAMPTON, asks leave to file the attached Reply in Opposition to a Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan, without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Respondent was afforded assigned counsel at all prior hearings below.

The respondent's affidavit in support of this motion is attached hereto.

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IN THE SUPREME COURT
OF THE UNITED STATES

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Petitioner,

-vs- No. 79 1446

WAYNE HAMPTON,

Defendant-Respondent.
_____/

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN OPPOSITION TO CERTIORARI
IN FORMA PAUPERIS

I, WAYNE HAMPTON, being first duly sworn, deposes and says that I am the defendant-respondent in the above entitled case; that in support of my motion to proceed in opposition to plaintiff-petitioner's petition for a writ of Certiorari without being required to prepay fees, costs (including printing costs) or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of the above proceeding are true.

1. Are you presently employed?

No.

b. July, 1979 - $125.00 per week.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of self-employment, or in the form of rent payments, interest, dividends, or other source?

a. Yes. I painted apartments for my girlfriend's landlord three (3) different times in the last twelve (12) months, and received seventy five dollars ($75.00) each time.

3. Do you own any cash or checking or savings account?

a. Yes. Ten dollars ($10.00) cash. No checking or savings account.

4. Do you own any real estate, stocks, bonds,

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notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

No. My car was repossessed and I still owe a balance of five hundred seventy one dollars ($571.00) on the contract.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Wayne Hampton
WAYNE HAMPTON

Subscribed and sworn to before me
this 18th day of July, 1980.

Cheryl A Browne
Cheryl A. Browne, Notary Public
Wayne County, Michigan
Acting in Oakland County, Michigan
My Commission Expires: 7/26/80

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